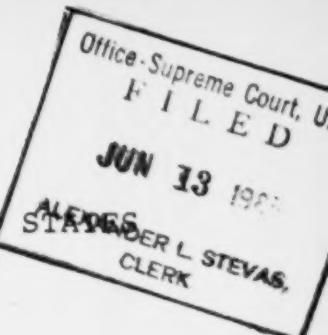


82-2035

IN THE  
SUPREME COURT OF THE UNITED STATES  
September Term, 1983



No. 83-

HERVEY JACKSON

Petitioner

v.

RONALD F. HANDLEY

and

TOWN OF SEARSPORT

Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHEN REVIEWING A DENIAL OF ATTORNEY FEES SOUGHT BY A PREVAILING PLAINTIFF UNDER 42 U.S.C. §1988, MAY AN APPELLATE COURT REOPEN AND DECIDE THE MERITS OF THE UNDERLYING SUBSTANTIAL §1983 CLAIM WHEN THAT CLAIM WAS NOT SPECIFICALLY ADJUDICATED BELOW.
- II. IN LIGHT OF PARRATT V. TAYLOR, DOES A WELFARE AGENCY'S INTENTIONAL REFUSAL TO ISSUE A WRITTEN DECISION GRANTING OR DENYING AN APPLICATION FOR GENERAL ASSISTANCE UNTIL ORDERED TO DO SO BY A COURT INJUNCTION RAISE A SUBSTANTIAL DUE PROCESS CLAIM SUFFICIENT TO SUPPORT AN AWARD OF ATTORNEY FEES UNDER 42 U.S.C. §1988.

(i)

PARTIES TO THE PROCEEDING

The parties to this action are:  
Hervey Jackson, Plaintiff/Petitioner;  
Inhabitants of the Town of Searsport,  
Defendant/Respondent; and Ronald F.  
Handley, in his capacity as General  
Assistance Administrator of the Town  
of Searsport, Defendant/Respondent.

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OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court was initially reported by the Reporter of Decisions as Decision No. 3153, Law Docket No. WAL-82-204, decided February 18, 1983. The decision is officially reported at 456 A.2d 852 (Me. 1983).<sup>1</sup>

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<sup>1</sup> The decision is attached in Appendix 1.

## JURISDICTION

This petition seeks review of the decision of the Maine Supreme Judicial Court in Jackson v. Inhabitants of the Town of Searsport, et al.<sup>2</sup> Plaintiff timely filed a Motion for Rehearing which was denied by the Maine Supreme Judicial Court on March 14, 1983. (A copy of this Order is attached as Appendix 3.) Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(3).

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<sup>2</sup>This decision was issued and entered on February 18, 1983

CONSTITUTIONAL AND STATUTORY  
PROVISIONS

UNITED STATES CONSTITUTION  
FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1988

Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of

Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

22 M.R.S.A. §4450

**§4450. Definitions**

As used in this chapter, unless the context indicates otherwise, the following words and terms shall have the following meanings.

1. **Eligible person.** "Eligible person" means a person who is qualified to receive general assistance from a municipality according to standards of eligibility determined by the municipal officers whether or not that person has applied for general assistance.

2. **General assistance program.** "General assistance program" means a service administered by a municipality for the immediate aid of persons who are unable to provide the basic necessities essential to maintain themselves or their families. A general assistance program provides a specific amount and type of aid for defined needs during a limited period of time and is not intended to be a continuing "grant-in-aid" or "categorical" welfare program. This definition shall not in any way lessen the responsibility of each municipality to provide general assistance to a person each time that the person has need and is found to be eligible to receive general assistance.

3. Net general assistance costs. "Net general assistance costs" means those direct costs incurred by a municipality in providing assistance to eligible persons according to standards established by the municipal officers and does not include the administrative expenses of the general assistance program.

4. Overseer. "Overseer" means an official designated by a municipality to administer a general assistance program. The municipal officers shall serve as a board of overseers if no other persons are appointed or elected.

22 M.R.S.A. §4504

**§4504. Establishment of eligibility standards.**

1. Program required; ordinance. A general assistance program shall be operated by each municipality and shall be administered in accordance with an ordinance enacted, after notice and hearing, by the municipal officers of each municipality.

2. Availability of ordinance. Each such ordinance shall be available in the town office and shall otherwise be easily accessible to any member of the public. Notice to that effect shall be posted.

3. Standards of eligibility. Each such ordinance shall establish standards of eligibility for relief. These standards shall:

- A. Govern the determination of need of persons applying for relief and the amount of assistance to be provided to eligible persons;
- B. Provide that all individuals wishing to make application for relief shall have the opportunity to do so; and
- C. Provide the relief shall be furnished or denied to all eligible applicants within 24 hours of the date of submission of an application.

4. Ordinance filed. Each municipality shall present a copy of the ordinance establishing eligibility standards to the Commissioner of Human Services. Any amendment or modification of the municipal ordinance shall be submitted to the commissioner for filing.

5. Work requirement. A municipality may, by an ordinance enacted after notice and hearing, by its municipal officers, provide that an otherwise eligible person who is capable of working may be required to perform work for the municipality as a condition to receive general assistance. Any such work requirement shall be subject to the following provisions.

STATEMENT OF THE CASE

In February, 1982, Hervey Jackson was a disabled seventy-eight year old man recovering from colostomy surgery. Unable to pay for the total monthly cost of his care at the Bayview Boarding Home, Mr. Jackson applied to the Town of Searsport, Maine for municipal general assistance. <sup>1</sup>

Between February 19, 1982 and March 11, 1982, Mr. Jackson made repeated written requests for assistance from the Town of Searsport. Receiving no decision on his applications, he also

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<sup>1</sup>The total monthly cost of the boarding home care was \$582.00; Mr. Jackson's total monthly income, a Social Security check, was \$226.10. At the time of his application for town assistance, on February 19, 1982, Mr. Jackson was several months behind in his payments to the home and had received an eviction notice.

requested hearings to review the Town Manager's failure to act on his requests for assistance.<sup>2</sup>

After it became apparent that the Town did not intend to issue written decisions on his applications, grant assistance, nor provide an administrative review hearing, Mr. Jackson commenced an action in Waldo County Superior Court. He sought declaratory and injunctive relief which would require Defendants to process his general assistance application in a manner consistent with the due process clause of the Fourteenth Amendment to the United States Constitution and the

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<sup>2</sup>Mr. Jackson's second and third applications for assistance were submitted to the Town Manager on March 5 and March 11, 1982. Each of these applications included a request for a hearing to review the Town's failure to act on the previous application.

Maine municipal general assistance statute. Mr. Jackson also requested payment of attorney fees, pursuant to 42 U.S.C. §1988. <sup>3</sup>

On April 26, 1982, the Waldo County Superior Court heard Plaintiff's complaint, consolidating his request for a Preliminary Injunction with the final hearing on the merits. At the time the case was heard, over two months after Plaintiff's first application for assistance, the Town had still taken no action on Plaintiff's assistance applications or his fair hearing requests. After hearing, the Superior Court found that Defendants had failed to act on the applications and had failed and refused to hold a fair hearing on the

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<sup>3</sup>A copy of Plaintiff's Superior Court Complaint is attached as Appendix 4.

Administrator's failure to act. Based on these findings, the Court granted the requested injunctive relief, ordering Defendants to issue a decision on Plaintiff's applications by the next working day and ordering the subsequent fair hearing procedures, if necessary, meet certain basic procedural requirements. The Court did not specify whether the relief ordered was based on Plaintiff's state statutory claim, or his federal Constitutional due process claim, or both. <sup>4</sup>

In the same Order, the Superior Court denied Plaintiff's request for

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<sup>4</sup>The Superior Court's Order is attached as Appendix 2. A judgment ordering Defendants to provide Mr. Jackson's municipal general assistance was issued one year later, on April 12, 1983, after a second appeal to Superior Court challenging the Town's denial of assistance. In May, 1983, Mr. Jackson died.

attorney fees. From the bench, the Superior Court judge gave as reasons for his denial of fees: (1) the Town Manager's busy schedule and his alleged confusion over Plaintiff's eligibility for assistance; (2) Plaintiff's counsel's status as an attorney for Legal Services for the Elderly, a non-profit corporation serving the legal needs of Maine's elderly population; and (3) the lack of "compelling circumstances" which would warrant the granting of attorney's fees.

Plaintiff appealed the denial of \$1988 attorney's fees to the Maine Supreme Judicial Court. By decision dated February 18, 1983, that Court denied Plaintiff's appeal. The Supreme Judicial Court proceeded to decide the merits of Plaintiff's due process

claim.<sup>5</sup> Finding that Plaintiff would not have prevailed on that claim, the Court affirmed the denial of Plaintiff's attorney's fees request.<sup>6</sup> The Court held that general assistance "applicants" have no property interest in benefits protected by the due process clause. Further, the Court held that even if a deprivation did occur, Plaintiff had all the process that was due him under Parratt v. Taylor, 451

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<sup>5</sup> Both the Superior Court and the defendants conceded below that Plaintiff had raised a meritorious due process claim, therefore permitting the Court in its discretion to award fees under 42 U.S.C. §1988. The sole focus of the arguments before the Maine Supreme Judicial Court and the Superior Court was therefore whether the Court properly exercised its discretion under §1988 in denying fees based on the factors enumerated above.

<sup>6</sup> See, Maine Supreme Judicial Court decision, Appendix 1, 456 A.2d, at 852-853.

U.S. 527 (1982). Plaintiff filed a Motion for Re-hearing within 14 days of the decision, as required by Rule 76A(b) of the Maine Rules of Civil Procedure. On March 14, 1983, the Supreme Judicial Court issued an Order denying Plaintiff's Motion for Reconsideration without opinion.<sup>7</sup>

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULING IN MAHER v. GAGNE AND WITH SUBSEQUENT FEDERAL CIRCUIT COURT DECISIONS INTERPRETING MAHER.

In Maher v. Gagne, 448 U.S. 112 (1980), this Court held that a federal law claim which had not been specifically adjudicated could nevertheless support an award of attorney's fees pursuant to 42 U.S.C. §1988. The Court

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<sup>7</sup>The Order denying reconsideration is attached as Appendix 2.

ruled that unless the federal claim supporting the attorney's fees award was insubstantial, fees were to be awarded. "Insubstantiality" was to be determined by reference to Hagans v. Lavine, 415 U.S. 528 (1974). In so holding, the Court followed rather explicit legislative history on the point. H.R. Rep. 1558, p.4, n.7 (1976). It expressly rejected an argument by the State of Connecticut that it should closely analyze the merits of the underlying federal claim. 448 U.S. at 131, 132 n. 15.

Since Maher, several federal courts of appeals and state courts have applied this Court's reasoning in Maher to allow §1988 attorney fees awards in similar cases, where Plaintiffs prevailed and had raised "substantial" Constitutional

claims. <sup>8</sup>

The Maine Supreme Judicial Court decision in this case is in direct conflict with Maher and all of the other federal and state cases cited above. Here, the Plaintiff prevailed. The trial court did not indicate the basis of its judgment which granted Plaintiff the relief he sought. Openly disagreeing with Congress' designation of the Hagans substantiality standard and casting aside this Court's explana-

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<sup>8</sup>See, e.g., Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982); Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982); Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (4th Cir. 1981); Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980); Canterbury Nursing Homes, Inc. v. Alabama State Health Planning and Development Agency, 425 So.2d 1103 (Ala. 1983); Stratos v. Dept. of Public Welfare, 387 Mass. 312 (1982); Draper v. Town Clerk of Greenfield, 425 N.E.2d 333, (Ma. 1981).

tion of Congressional policy in Maher, the Maine Supreme Judicial Court announced that it would require Plaintiff to prevail on the merits of his Constitutional claim in order to receive §1988 attorney's fees. This holding openly defies the Act and creates inconsistent enforcement of important federal law.

At least one other state Supreme Court has ignored the "substantiality" standard set forth in Maher. See, e.g., Gumbhir v. Kansas State Board of Pharmacy, 646 P.2d 1078 (Kan. 1982), cert. den., 51 U.S.L.W. 3508 (January 10, 1983).

State courts should not be permitted to ignore the substantiality rule enunciated in Maher. Important policies of judicial economy underly the rule.

Constitutional questions should not be litigated on a motion for attorney fees when the merits of a case have already been settled or otherwise adjudicated.

The writ should therefore be granted to prevent the erosion of this Court's teachings and to assure uniform application of §1988 in state as well as federal courts.

II. THE COURT BELOW ERRED IN HOLDING THAT PARRATT v. TAYLOR FORECLOSED PLAINTIFF'S DUE PROCESS CLAIM.

This case presents the question of whether a town official may intentionally refuse to act on an indigent's application for municipal general assistance, refuse to provide a statement of a right to a hearing, and refuse to grant a hearing after one is requested, and still not run afoul of the due process clause of the United States Constitution.

The Maine Supreme Judicial Court found Petitioner's claim that he was denied property without due process of law was without merit.<sup>9</sup> It found first that a person who applies for municipal general assistance but never gets an answer concerning his application is not deprived of any property right at all.<sup>10</sup>

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<sup>9</sup> See Argument, supra, as to why the Court below committed error by even reaching the merits.

<sup>10</sup> The Court below thought that Petitioner asserted a property right in the state law procedure mandating written decisions concerning general assistance applications within 24 hours. The property interest asserted by Petitioner, however, was in benefits, not in procedure. When the State created an entitlement to general assistance benefits for people with an immediate need for necessities, the Petitioner (as such a person in need) had a protected property interest from

Relying on Parratt v. Taylor, the Court below also found that Petitioner

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the time of his application. See, Board of Regents v. Roth, 408 U.S. 564 (1972). The Court below totally confused the question of whether there was a protected property interest with the question of what process was due (a matter of federal law) before Petitioner could be deprived of that interest. In its confusion, it contradicted every federal court of appeals which has considered the question of whether an applicant for public benefits has a property interest in those benefits. See, e.g., Carey v. Quern, 588 F.2d 230 (7th Cir. 1978); White v. Roughton, 530 F.2d 750 (7th Cir. 1976); Griffith v. Detrich, 603 F.2d 118 (9th Cir. 1979); Davis v. Ball Memorial Hospital, 653 F.2d 1100 (7th Cir. 1981); Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982); and Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974).

Once the State statute creates the entitlement to the benefit, the property interest is protected against deprivation without due process even before an official decision regarding eligibility is rendered. Like v. Carter, 448 F.2d 798 (8th Cir. 1971).

had received all of the process that was due him because of the availability of a state statute authorizing court actions to review administrative actions.

The Maine Court's reliance on Parratt v. Taylor should be reviewed by this Court for two reasons:

a. Its decision is in conflict with the decisions of at least four federal courts of appeals which indicate that Parratt v. Taylor should not be interpreted to extend to intentional deprivations of property (an issue which has not been settled by this Court); and

b. Its decision is in conflict with applicable decisions of this Court and at least four federal courts of appeals regarding the factors to be considered in deciding whether a state law

remedy is adequate under Parratt to provide all the process that is Constitutionally due.

The Court below held that Parratt applied to the intentional failure by the Respondent Town to act on Petitioner's application for general assistance and to provide Petitioner with a notice and hearing. Parratt dealt only with the negligent loss of a prisoner's hobby kit. Four federal courts of appeals have explicitly held that Parratt should not be extended to intentional deprivations, especially in light of the concurring opinions in Parratt indicating the limited scope of that decision. See, Brewer v. Blackwell, 692 F.2d 387, 394-395 (5th Cir. 1982); Evans v. Chicago, 689 F.2d 1286, 1298 (7th Cir. 1982); Weiss v. Lehman, 676 F.2d 1320,

1323 (9th Cir. 1982); and Coleman v. Faulkner, 697 F.2d 1347, 1349 n.3 (10th Cir. 1982). One Court, Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983), has explicitly extended Parratt to reach intentional conduct.

Parratt should not be extended to reach intentional conduct because to do so would be to leave people in a similar situation to that in which they would have found themselves before the Fourteenth Amendment and 42 U.S.C. §1983 were passed: subject to intentional deprivations of their life, liberty and property by state actors, with only a state remedy available, but no federal remedy. See, Monroe v. Pape, 365 U.S. 167 (1961). That problem looms even larger when, as in this case, a citizen confronts an intentional violation by

the official who is charged with administering the program, rather than a subordinate employee of a large institution as in Parratt. See, Evans v. Chicago, supra, at 1297.

The decision below also presents a conflict with the decisions of this Court and of several courts of appeals which have required a close examination of the adequacy of a state law remedy to provide the process that is due. 11

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11Such consideration include: length of judicial process involved (Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982)); indigency of the aggrieved party denying the possibility of a practical remedy (Coleman v. Faulkner, 697 F.2d 1347 (10th Cir. 1982)); availability of a state law cause of action against malicious conduct as well as negligent conduct (Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983)); availability of damages as a remedy (Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983)); availability of relief in a timely manner (Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982)); and the availability of damages for the specific period of the Town's delay in acting in accordance with law (Evans v.

This Court should review the decision below to make clear what elements the Court below should have considered.

The remedy to which the Court below would remit the Petitioner must be measured in light of the individual interest at stake; i.e., the immediate provision of his basic needs from the provider of last resort. See Beaulieu v. City of Lewiston, 440 A.2d 334 (Me. 1982) (General Assistance programs in Maine must provide basic necessities to indigent applicants.) Regardless of the

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Chicago, 689 F.2d 1286 (7th Cir. 1982)).

Other Courts of appeals, like the Court below, have simply recited the adequacy of state law remedies without considering any of these elements. (See, for example, Dusaner v. Hannon, 667 F.2d 538 (7th Cir. 1982); Franklin v. State of Oregon, 662 F.2d 1337, 1345 (9th Cir. 1981); Flower Cab Co. v. Petitte, 685 F.2d 192 (7th Cir. 1982)).

other many factors that cause the State remedy not to provide the process due Petitioner (indigency, timing, and availability of damages), the bottom line is that the State judicial remedy can never provide what due process requires; a prompt administrative written determination of eligibility, and a notice of appeal rights. While due process requires these elements, subsequent state law judicial proceedings will never be timely enough to provide this process that is due.

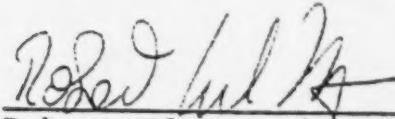
This case presents a State Court decision which clearly contradicts all courts of appeals on the question of whether an applicant for benefits has a protectible property interest. In addition, this case presents the opportunity for this Court to resolve the split in

the Courts of Appeals as to whether  
Parratt v. Taylor applies to intentional  
conduct and an opportunity to address  
the issue of what elements must be con-  
sidered to determine the adequacy of the  
State Court remedy.

CONCLUSION

For these reasons, a writ of cer-  
tiorari should issue to review the  
judgment and opinion of the Maine  
Supreme Judicial Court.

Respectfully submitted,

  
\_\_\_\_\_  
Robert Edmond Mittel

DATED: June 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the within Petition for Writ of Certiorari to be served upon Peter K. Mason, Esq., attorney for Respondents, by depositing a copy of the Petition for Writ of Certiorari in the United States Mails, this date, postage prepaid, addressed to Peter K. Mason, Main Street, Searsport, Maine 04974.

June 10, 1983

  
\_\_\_\_\_  
Robert Edmond Mittel

APPENDIX 1

Hervey JACKSON

v.

INHABITANTS OF the TOWN OF SEARSPORT,  
et al.\*

Supreme Judicial Court of Maine

Argued Nov. 16, 1982.  
Decided Feb. 18, 1983.

Before McKUSICK, D.J., and GODFREY,  
NICHOLS, ROBERTS, CARTER and WATHEN,  
JJ.

NICHOLS, Justice.

In a day when dockets, state and  
federal, abound with litigation invoking  
42 U.S.C. §1988, the Civil Rights  
Attorney's Fees Awards Act, <sup>1</sup> this

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<sup>1</sup>In pertinent part, section 1988  
provides:

In any action or proceeding to  
enforce a provision of sections  
1981, 1982, 1983, 1985 and 1986 of  
this title, title IX of Public Law  
92-318, or title VI of the Civil  
Rights Act of 1964, the court, in  
its discretion, may allow the pre-  
vailing party, other than the United  
States, a reasonable attorney's fee  
as part of the costs.  
42 U.S.C. § 1988 (1981).

appeal presents the narrow question of whether it was appropriate for the Superior Court to deny such an award where a person had to resort to court action to obtain general assistance from his town.

We affirm the judgment below. We reach that result, however, for reasons other than those advanced by the Superior Court.

The plaintiff, Hervey Jackson, of Searsport, on February 20, 1982, filed an application for general assistance with the Town of Searsport. The Town failed to grant or deny his application within twenty-four hours as required by 22 M.R.S.A. § 4504(3)(C) and Searsport's general assistance ordinance. 2

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<sup>2</sup>22 M.R.S.A. § 4504(3)(C) (1980) requires that every municipality have a general assistance ordinance;

On March 5, 1982, the Plaintiff reapplied for general assistance. At that time he also requested a "fair hearing" on the Town's failure to act on his February 20, 1982, application. No such hearing was held, in apparent violation of both 22 M.R.S.A. § 4507 and the town ordinance. <sup>3</sup>

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each such ordinance shall "[p]rovide that relief shall be furnished or denied to all eligible applicants within 24 hours of the date of submission of an application."

Accordingly, the "General Assistance Rules and Regulations" of the Town of Searsport state that: "Unless an application is withdrawn, the general assistance administrator must make a decision concerning the applicant's eligibility within 24 hours after completion of the written application form." Id. at § III(D) (1977).

<sup>3</sup>Section 4507 states in part:

Any person aggrieved with a decision, act, failure to act or delay in action concerning his application for general assistance under this chapter

On March 8, 1982, the Plaintiff filed a complaint in Superior Court (Waldo County) seeking from the Town and Ronald F. Handley, its then Town Manager and General Assistance Administrator, not only both declaratory and injunctive relief but also compensatory and punitive damages for the Town's failure to act on his application within the twenty-four hour statutory period.<sup>4</sup>

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shall have the right to a fair hearing . . . A hearing shall be held by the municipality within 7 days following the receipt of a written request by the applicant for a fair hearing.

22 M.R.S.A. § 4507 (1981). Searsport's "General Assistance Rules and Regulations" § VII (1977) tracks this provision.

<sup>4</sup>Such judicial review is clearly contemplated by the Maine general assistance statute, which provides that: "Review of any action or failure to act under this chapter shall be pursuant to the Maine Rules of Civil Procedure, Rule 80-B." 22 M.R.S.A. § 4507(1980).

The relief claimed was predicated on our general assistance statute, the Searsport ordinance, and the fourteenth amendment to the United States Constitution. <sup>5</sup> To assert his constitutional claim the Plaintiff invoked 42 U.S.C. § 1983; <sup>6</sup> additionally, he sought attorney's fees pursuant to 42 U.S.C. § 1988.

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<sup>5</sup> In relevant part the Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

<sup>6</sup> This section provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

On April 26, 1982, the Superior Court held a consolidated hearing on the application for injunctive relief and on the merits pursuant to M.R.Civ.P.

65(b)(2), the Plaintiff previously having dismissed his damage claims. In an order entered four days later, the Superior Court (a) required the Town of Searsport to grant or deny the

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United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983(1981).

Plaintiff's applications by May 3, 1982; and (b) directed that a fair hearing be held within seven days, should the Plaintiff's applications be denied.

This order did not specify whether the court was relying on state or federal grounds in granting this relief. The court also denied without explanation the Plaintiff's motion for attorney's fees under section 1988. This timely appeal followed.

In denying the Plaintiff's request for attorney's fees under section 1988, it appears that the Superior Court treated this determination as a matter of judicial discretion.<sup>7</sup> Although on

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<sup>7</sup>The record reflects that the Superior Court denied the Plaintiff attorney's fees principally on the basis of the Defendant's good faith and the circumstance that the Plaintiff was represented in this cause by public interest counsel.

this appeal the parties have focused on the question of whether the reasons articulated by the court were legally sufficient to justify the denial of fees under section 1988, our inquiry proceeds on a more fundamental level, looking first at the scope of section 1988 and then at the nature of the Plaintiff's federal claim.

Section 1988 Awards in Pendent Claim Actions

Section 1988 allows a court to award attorney's fees to a "prevailing party" in an action under certain civil rights laws, including section 1983.

Determining who constitutes a prevailing party for purposes of section 1988 has proven a difficult enough task when solely federal constitutional or statu-

tory claims are asserted; <sup>8</sup> the difficulties compound when a federal claim and one or more state claims are combined in the same suit. <sup>9</sup>

In an action, such as the case at bar, where a claim asserted under sec-

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<sup>8</sup>For discussion of a representative problem arising in this context see Note, Civil Rights Attorney's Fees Awards in Moot Cases, 49 U.Chi.L.Rev. 819 (1982).

For excellent discussion of some of the issues in this area see Note, Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds, 130 U.Pa.L.Rev. 488 (1981) and Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act, 2 W.NewEng.L.Rev. 193 (1979).

<sup>9</sup>For excellent discussions of some of the issues in this area see Note, Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds, 130 U. Pa. L. Rev. 488 (1981) and Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act, 2 W. New Eng. L. Rev. 193 (1979).

tion 1983, is appended to state claims, a problem arises. Consistent with the sound judicial policy which favors non-constitutional resolution of cases,<sup>10</sup> a court may prefer to rest its decision on state, rather than federal grounds. The question then becomes whether the party has "prevailed" under section 1983, so as to allow an award of attorney's fees under section 1988.

If the "prevailing party" requirement of section 1988 were read strictly, it would not permit an award of attorney's fees unless a court actually passed upon a party's section 1983 claim

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<sup>10</sup>"[A] court should 'avoid expressing opinions on constitutional law whenever a nonconstitutional resolution of the issues renders a constitutional ruling unnecessary.'" State v. Bassford, 440 A.2d 1059, 1961 (Me. 1982) (quoting Your Home, Inc. v. City of Portland, 432 A.2d 1250, 1257 (Me. 1981)).

and ruled on it in that party's favor. The legislative policy behind section 1988 of encouraging private enforcement of civil rights and the judicial policy of avoiding constitutional decision-making would work at cross purposes. 11

The drafters of the Civil Rights Attorney's Fees Awards Act acted to forestall this dilemma. The House Report noted that in a situation where a party joins federal and state claims and prevails only on the state claim, attorney's fees may be awarded if (1) the federal claim is substantial, and

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11For example, a party with a valid constitutional claim under section 1983 and a valid claim under state law would have to choose between asserting both and possibly losing the fee, on the one hand, and on the other, taking his chances alone on the vagaries of constitutional law.

(2) the state claim arises out of a  
"common nucleus of operative fact."<sup>12</sup>

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<sup>12</sup>The House Report states:

To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim for the purpose of awarding counsel fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 [86 S.Ct. 4130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra at 725, 86 S.Ct.

The "substantiality" requirement has generated considerable debate. The federal claim must be a substantial one, Maher v. Gagne, 448 U.S. 122, 132, 100 S.Ct. 2570, 2576, 65 L.Ed.2d 653 (1980); the requisite degree of substantiality is not so apparent.<sup>13</sup> This confusion

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at 1138.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7(1976), reprinted in Staff of Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Civil Rights Attorney's Fees Awards Act of 1976 Source Book 212 (Comm. Print 1976).

<sup>13</sup>See Note, Civil Rights Attorney's Fees in Cases Resolved on State Pendent and Federal Statutory Grounds, supra note 9, at 518-19; Wolf, supra note 9, at 239.

The confusion about the required degree of substantiality is in part attributable to the House Report's reference to Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 29 L.Ed.2d. 577 (1974). In Hagans, the Supreme Court elaborated the substantiality requirement for federal question jurisdiction in the federal courts. The Court referred to prior decisions wherein it

notwithstanding, two principles are clear. A party who only asserts and

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denied jurisdiction because asserted federal claims were either "'so attenuated and unsubstantial as to absolutely devoid of merit,' . . . 'wholly insubstantial,' . . . "obviously open to discussion.'" 415 U.S. at 537, 94 S.Ct. at 1379. Justice Rehnquist, in dissent, responded: "Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face." 415 U.S. at 564, 94 S.Ct. at 1392. It should be noted that the Hagans standard is a threshold test for getting into federal court. Deriving originally from the judicial power conferred by Article III, this prospective standard governs a federal court's determination at the outset of litigation of whether it has power to hear a cause. Granting the Hagans standard onto the necessarily retrospective inquiry of whether a party has prevailed for purposes of section 1988 has scant support in logic. The argument that the Hagans standard is one with which the federal courts are already familiar is no justification at all when a state court hears pendent claims.

prevails on a state law claim cannot recover attorney's fees under section 1988. Likewise, if that same party joins with his state claim a federal claim under section 1983 which is adjudicated to be without merit with respect to the award of attorney's fees he stands in no different position. <sup>14</sup>

Bunting v. City of Columbia, 639 F.2d 1090, 1095 (4th Cir. 1981); Bly v. McLeon, 605 F.2d 134, 139 (4th Cir.

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<sup>14</sup>This conclusion is reinforced by the decision in Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (per curiam) where in referring to section 1988 awards pendente lite, the Court stated: "[It] seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Id. at 757, 100 S.Ct. at 1989. See Note, Civil Rights Attorney's Fees Awards in Moot Cases, supra note 8, at 828-29.

1979); Gumbhir v. Kansas State Board of Pharmacy, 231 Kan. 507, 517-23, 646 P.2d 1078, 1087-90 (1982), petition for cert. filed, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 724, 74 L.Ed.2d 950, 51 U.S.L.W. 3199 (U.S. Sept. 9, 1982 (No. 82-427)).  
See also Reel v. Arkansas Department of Correction, 672 F.2d 693, 698-99 (8th Cir. 1982); Haywood v. Ball, 634 F.2d 740, 743 (4th Cir. 1980); Bess v. Toia, 66 A.D.2d 844, 844-45, 411 N.Y.S.2d 651, 653 (N.Y.App.Div. 1978).

To allow the assessment of attorney's fees under section 1988 when a meritless federal claim is asserted, in no way would promote the private enforcement of civil rights. Moreover, to require the award of attorney's fees merely because a meritless federal claim is tagged onto a valid state claim would

create serious federalism problems.

In our state, as elsewhere in this country, the "American Rule" for attorney's fees is followed: each party pays the costs of his own lawyers.<sup>15</sup> Here the rule is: "Except for some kinds of tortious conduct, the Maine state courts have no authority to include attorney's fees as part of costs in the absence of statutory authorization or agreement of the parties."

Thiboutot v. State, 405 A.2d 230, 238 (Me. 1979), aff'd, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). See also Vance v. Speakman, 409 A.2d 1307, 1311 (Me. 1979).

[1] While the American Rule is not

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<sup>15</sup>See generally, Note, Civil Rights Attorney's Fees in Cases Resolved on State Pendent and Federal Statutory Grounds, supra note 9, at 488 n. 1.

without its critics,<sup>16</sup> it remains the rule in our state, and it is an essential feature of our judicial process. To allow attorney's fees under section 1988 to parties who assert meritless federal claims along with valid state claims would in many cases effectively abrogate the American Rule. Any person with a claim founded in state law against a state or its subdivisions would have every incentive to interject a section 1983 claim into the action, regardless of its validity. We will not so easily infer as drastic an intrusion by Congress into the internal functioning of judicial systems of the several states. As we declared in

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<sup>16</sup>See, e.g., Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651 (1982).

Vance v. Speakman, "a statutory right to recover attorney's fees will be found only in the clearest kind of legislative language." 409 A.2d at 1311. If a federal claim under the civil rights laws has no merit, it cannot serve as the predicate for the imposition of attorney's fees simply because it is appended to a valid state claim. We must, therefore, decide if the Plaintiff in the case at bar had a meritorious claim under section 1983.

The Section 1983 Claim

Even as an award of attorney's fees under section 1988 is contingent on the existence of a substantial claim under section 1983, so recovery under section 1983 turns on the presence of a federal constitutional or statutory violation.

See Maine v. Thiboutot, 448 U.S. 1,

4-8, 100 S.Ct. 2502, 2504-2506, 65

L.Ed.2d 555 (1980). In the case before us the Plaintiff alleged no federal statutory violation; his section 1983 claim rests solely on an asserted violation of his fourteenth amendment rights.

Specifically, the Plaintiff contends that the Town of Searsport's failure to act on his general assistance application violated his right to procedural due process under the fourteenth amendment.<sup>17</sup>

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<sup>17</sup>Although the Plaintiff's complaint loosely alleged a violation of his fourteenth amendment rights, his trial memorandum argued more specifically that the Town's inaction violated his due process rights. Consonant with the policy of M.R.Civ.P. 8(f) that pleadings be construed so as to do "substantial justice" we read his complaint and trial memorandum together to state a claim under the Due Process Clause of the fourteenth amendment. Counsel are cautioned, however, that particularly in the civil rights area, pleadings should precisely spell out any constitutional

[2] Procedural due process claims require a two-stage analysis. First, it must be determined if there has been a deprivation of an individual's life, liberty or property interests. Second, if such a deprivation has occurred, a determination must be made as to what process is due under the fourteenth amendment. Ingraham v. Wright, 430 U.S. 651, 672, 97 S.Ct. 1401, 1403, 51 L.Ed.2d 711 (1977); Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct.

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claims which may be asserted.

No substantive due process violation is alleged or apparent in this action; accordingly, we need only consider the procedural due process implications of the Town's inaction.

2701, 2706, 33 L.Ed.2d 548 (1972).

[3] As the first stage of this analysis, then, we must decide whether the Town of Searsport deprived the Plaintiff of any "property" interest safeguarded by the fourteenth amendment.<sup>18</sup> It is helpful in this regard to carefully review the interaction between the Plaintiff and the Town up until the Plaintiff filed his complaint in Superior Court.

Jackson filed his first general assistance application on February 20, his second application and a fair hearing request on March 5, and his complaint in Superior Court on March 8, 1982. We are thus concerned with a period of sixteen days. During this

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<sup>18</sup>No life or liberty interests are implicated in this action.

period Jackson's application was not granted; neither was it denied. Action simply was deferred by the Town, in violation of both the Maine general assistance statute and Searsport's town ordinance. The first question we must decide is whether the Plaintiff had a constitutionally protected property interest in the timely processing of his application.

This case does not present the question of whether a person currently receiving general assistance has a constitutionally protected property interest in the continued receipt of that assistance. Cf. Goldberg v. Kelley, 397 U.S.254, 261-63, 90 S.Ct. 1011, 1016-18, 25 L.Ed.2d 287 (1970). Neither does it present the question of whether an arbitrary denial of general

assistance to an eligible, first-time applicant would infringe any property right.<sup>19</sup> Instead, the property right asserted here derives from an administrative timetable this State has imposed on municipalities for processing general assistance applications. In short, the question is whether there is a property right in procedure.

We have never in the past accorded

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<sup>19</sup>We note the difficult issues which would be presented by a denial of benefits of which an applicant has no "present enjoyment." Compare J. Nowark, R. Rotunda, and J. Young, Constitutional Law 491-94 (1978) with L. Tribe, American Constitutional Law 518-19 (1978). Of course, it is possible that under some circumstances prolonged municipal inaction on an application for general assistance would be tantamount to a denial of benefits. We do not find this the case in the present action in light of: (1) the evidence in the record indicating good faith on the part of the Town; and (2) the relatively short period of inaction involved here.

procedure the status of a property right. The implications of treating all statutory procedures as property interests are momentous. Any violation of state or municipal procedure would automatically be transformed into a constitutional violation, on which a federal suit under section 1983 could be brought immediately.<sup>20</sup> Concern that the fourteenth amendment is becoming a "font of tort law," Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47

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<sup>20</sup>After Patsy v. Board of Regents, U.S. \_\_\_, \_\_\_, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (U.S. 1982), it is clear that no exhaustion of state administrative remedies would be necessary prior to the institution of suit in federal court.

The threat of such suits would definitely discourage states from establishing administrative procedures according greater protections than required by the United States Constitution.

L.Ed.2d 405 (1976), would be overshadowed as enforcement of the administrative procedures of states, municipalities and their agencies became the domain of the federal courts, with the added threat of demand for attorney's fees always looming on the horizon.

Although the concept of property has evolved significantly from the era when the "right-privilege" distinction controlled,<sup>21</sup> it has not reached the

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<sup>21</sup>See generally Reich, The New Property, 73 Yale L.J. 733 (1964); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968); Monaghan, Of "Liberty" and "Property," 62 Cornell L.Rev. 405 (1977); Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L.Rev. 445 (1977); Terrell, "Property," "Due Process" and the Distinction Between Definition and Theory in Legal Analysis, 70 Geo.L.J. 861 (1982).

point where a statutorily prescribed timetable for the administrative consideration of general assistance applications has become a property right.

Property and procedure still remain functionally distinct concepts.

Professor Van Alstyne's explanation of due process is instructive:

As the fifth and fourteenth amendments read in fact, due process is not itself a protected entitlement.

Rather, the sole protected interests are "life, liberty, [and] property."

Due process stands in relation to these not as an equivalent constitutionally established entitlement, but only as a condition to be observed insofar as the state may move to imperil one of the named substantive interests. That is:

No State shall deprive any person of life, liberty, or property, without due process of law . . .

Insofar as the state may seek to divest one of his life, some aspect of his liberty, or some modicum of his property, then it may yet be able to do so assuming that the condition of due process is met. But procedural due process appears never to be anything more than a kind of "constitutional condition." It is evidently not a free standing human interest.<sup>22</sup>

In sum, while procedure may serve to protect property rights, it does not, by that association, itself become a pro-

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<sup>22</sup>van Alstyne, Cracks in "The New Property," supra note 21 at 451.

erty interest. In the case before us, there is not even the benefit of such an association. The Plaintiff had no preexisting interest in general assistance benefits. As the Supreme Court stated in Board of Regents v.

Roth: "The Fourteenth Amendment's procedural protection of property is a safeguard of interests that a person has already acquired in specific benefits."

408 U.S. 565, 576, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548 (1972) (emphasis added).

More recently the Court stated: "A state-created right can, in some circumstances beget yet other rights to procedures essential to the realization of the parent right. Plainly, however, the underlying right must have come into existence before it can trigger due process protection." Connecticut Board of

Pardons v. Dumschat, 452 U.S. 458, 463, 101 S.Ct. 2460, 2463, 69 L.Ed.2d 158 (1981) (citations omitted). <sup>23</sup>

The Town's failure to decide on the Plaintiff's applications or to hold a fair hearing within the prescribed periods did violate state law. It is well-established, however, that, "[v]iolation of local law does not necessarily mean that federal rights have been invaded." Paul v. Davis, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) (quoting Screws v. United States, 325 U.S. 91, 108, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495

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<sup>23</sup> As Professor Davis explains: "Due process protects 'property' only when a property 'right' is created by non-constitutional law." 2 K. Davis, Administrative Law Treatise § 11.3 (2d ed. 1979).

(1945).<sup>24</sup> Moreover, "[t]he simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." Slotnick v. Staviskey, 560 F.2d 31, 32 (1st Cir. 1977), cert. denied, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978). We conclude that the Town of Searsport's failure to follow the statutory procedures for processing his general assistance applications infringed no constitutionally protected property interest of the Plaintiff. <sup>25</sup>

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<sup>24</sup> As the Court noted in Snowden v. Hughes, "[m]ere violation of a state statute does not infringe the federal Constitution." 321 U.S. 1, 11, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944).

<sup>25</sup> See generally United States v. Jiles, 658 F.2d 194, 200 (3rd Cir. 1981); Molgaard v. Town of Caledonia, 527 F.Supp. 1073, 1079-80 (E.D.Wis.1981).

Arriving now at the second stage of our analysis, even if the Plaintiff had been deprived of a constitutionally protected property interest, we would not be persuaded that he has asserted a meritorious due process claim. We reach this conclusion with specific reference to the Supreme Court's decision in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Parratt, read together with the Court's earlier decisions in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), and Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), marks the emergence of a major shift in the Supreme Court's analysis of procedural due process

claims.<sup>26</sup> The central feature of this new approach is a focus on the availability of state-law remedies which prevent a deprivation of life, liberty or property from becoming a deprivation without due process.

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<sup>26</sup>See generally Friedman, Parratt v. Taylor: Opening and Closing the Door on Section 1983, 9 Hastings Const.L.Q. 545 (1982); Kirby, Demoting the 14th Amendment Claims to State Torts, 58 A.B.A.J. 166 (1982); Kupfer, Restructuring the Monroe Doctrine: Current Litigation Under Section 1983, 9 Hastings Const.L.Q. 463 (1982); Nahmed, Constitutional Accountability in Section 1983 Litigation, 68 Iowa L.Rev. 1 (1982); Comment, Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right, 43 U.Pitt.L.Rev. 1035 (1982); Note, Constitutional Law-Civil Rights-Negligent Injury by the State is Not Cognizable Under 42 U.S.C. Section 1983 When the State Provides Adequate Tort Claims Procedure, 56 Tul.L.Rev. 1441 (1982); Note, Defining the Parameters of Section 1983; Parratt v. Taylor, 23 B.C.L.Rev. 1219 (1982).

In Paul, a defamation action brought under section 1983, the Court first intimated that state tort law might constitute adequate "process" to protect a person's liberty interests. 424 U.S. at 712, 96 S.Ct. at 1165-66.<sup>27</sup> In Ingraham, a case involving corporal punishment in a public school, the Court concluded that a constitutionally protected liberty interest was implicated, but held that "the traditional common-law remedies are fully adequate to afford due process." 430 U.S. at 672, 97 S.Ct. at 1413.

In Parratt the Court was faced with a section 1983 claim by a prisoner who alleged that the loss by prison offi-

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<sup>27</sup>See Comment, Federalism, Section 1983 and State Law Remedies, supra note 26, at 1051.

cials of a "hobby kit" which he had ordered by mail constituted a deprivation of property without due process. In language quite appropriate for the case at bar the Court concluded:

[T]he respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment.

Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was prac-

ticable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State.

451 U.S. at 543, 101 S.Ct. at 1917. Although the factual circumstances of the instant case diverge somewhat from those present in Parratt, we are persuaded that the principles enunciated in that decision apply with equal force here.

As was the case in Parratt, if the Plaintiff was deprived of any "property," it was in derogation of - and not according to - established pro-

cedure. In terms of the availability of a state-law remedy, the case for such a remedy is much stronger here than in Parratt. In Parratt the respondent was not deemed to have suffered any due process violation because of the availability to him of a common law tort action. Here instead, the Plaintiff had a statutory right to judicial review, a right of which he took full advantage.<sup>28</sup>

The only potentially significant factor distinguishing the instant case from Parratt is that the record here indicates at least a degree of intentional action on the part of the Town in not acting in a timely fashion on the Plaintiff's applications. In Parratt,

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<sup>28</sup>See supra note 4.

only a negligent deprivation was alleged. This divergence is not fatal.

Parratt relied on Ingraham which involved intentional corporal punishment. Read together, Paul, Ingraham, and Parratt lead to the conclusion that an intentional taking of property may be adequately redressed through state-law remedies. The intentional-negligent distinction, moreover, is irrelevant to the question of the availability and adequacy of state procedures to satisfy the requirements of due process. We agree fully with the courts and commentators who have concluded the principle announced in Parratt apply to both negligent and intentional conduct by state officials.<sup>29</sup> Accordingly, we

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<sup>29</sup> See Engblom v. Carey, 677 F.2d 957 965 (2nd Cir. 1982) (eviction); Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.

conclude that even if a legitimate property interest were involved, our State procedure available to, and indeed invoked by, the Plaintiff would satisfy the due process requirements of the fourteenth amendment.

#### CONCLUSION

The only issue we have not addressed is that which was central to the written and oral arguments of both counsel-

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1982) (removal of children by welfare officers); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (assault and battery); Spilka Bus Corp. v. Board of Education, 83 A.D.2d 853, 854, 441 N.Y.S.2d 740, 741 (N.Y.App.Div. 1981) (termination of contract). See also Kirby supra note 26, at 171; Nahmod, supra note 26, at 7 n.51; Note, Defining the Parameters of Section 1983, supra note 26, at 1242-43; Note, Constitutional Law-Civil Rights, supra note 26, at 1452; Comment, Federalism, Section 1983 and State Law Remedies, supra note 26, at 1073-76.

whether the Superior Court's denial of attorney's fees to the Plaintiff was an abuse of discretion. Under our analysis, as this case was then postured the Superior Court had no discretion to exercise. Anything we might say on that issue would be pure dictum, so we shall abstain.

Here the plaintiff's section 1983 claim was without merit. The Court could not award attorney's fees under section 1988 because the Plaintiff's only valid claim was grounded in state law. The Superior Court's reasoning may have been in error, but so long as its conclusion was correct, the judgment must be affirmed. Allstate Insurance Company v. Lyons, 400 A.2d 349, 352 (Me. 1979).

The entry, therefore, is:

Appeal denied.

Judgment affirmed.

All concurring.

APPENDIX 2

STATE OF MAINE  
WALDO, ss.

SUPERIOR COURT  
Civil Action  
Docket No. CV 82-20

HERVEY JACKSON )  
Plaintiff )  
vs. ) ORDER  
RONALD F. HANDLEY and )  
TOWN OF SEARSPORT, )  
Defendants )

After hearing, the court makes the  
following findings of fact:

1. The Plaintiff Hervey Jackson made  
application for municipal general  
assistance on February 20, 1982, pursuant  
to Title 22 M.R.S.A. §4450, et seq. and  
"Town of Searsport, Rules and Regulations  
for General Assistance Administration"  
dated May 2, 1977. On March 5, 1982, the

Plaintiff Hervey Jackson requested a fair hearing on the failure to grant or deny the application dated February 20, 1982. On March 8, Plaintiff began this lawsuit by service. He again made application on March 10, 1982, and on March 11, 1982, the plaintiff Hervey Jackson requested a fair hearing on the failure to grant or deny the application of March 10, 1982.

2. At all times relative to the matter, the defendant Ronald F. Handley was General Assistance Administrator for the Town of Searsport. He has neither granted nor denied either the application of February 20, or the application of March 10. The defendant Handley and the defendant Town of Searsport have failed and refused to hold a fair hearing upon

either application, or upon the General Assistance Administrator's failure to act upon either application.

NOW, THEREFOR, IT IS HEREBY ORDERED:

I. The trial on the merits be consolidated with the preliminary injunction hearing pursuant to Rule 65(b) (2);

II. The defendant Town of Searsport, their agents, successor agents, and all those acting in concert with them are ordered to:

- (1) Grant or deny the plaintiff's two pending applications for general assistance on or before 11 AM on Monday, May 3, 1982;
- (2) Unless the applications aforesaid are granted, to hold a fair hearing

within 7 days following the grant or denial of the application, and at that fair hearing to afford the plaintiff the right to confront or cross-examine any witnesses against him, to present witnesses in his own behalf and be represented by counsel or other spokesman. The defendant Town of Searsport shall afford the plaintiff an adequate record of the said fair hearing, at its expense. The plaintiff shall be furnished with a written decision detailing the reasons for that decision, within a reasonable time after the aforesaid fair hearing.

III. Plaintiff's request for attorney's fees incurred in bringing this

action, is denied.

Dated: April 30, 1982  
1:00 p.m.

s/Morton A. Brody  
JUSTICE, SUPERIOR COURT

## APPENDIX 3

STATE OF MAINE      SUPREME JUDICIAL COURT  
                          SITTING AS THE LAW COURT  
                          Law Docket No. Wal-82-204

HERVEY JACKSON )  
vs. ) ORDER  
INHABITANTS OF THE )  
TOWN OF SEARSFORT )

Upon motion of appellant for  
reconsideration.

It is ORDERED that the motion be and  
hereby is DENIED. The mandate shall issue  
forthwith.

Dated this fourteenth day of March,  
1983.

For the Court

s/Vincent L. McKusick  
Chief Justice

APPENDIX 4

STATE OF MAINE  
Waldo, ss.

SUPERIOR COURT  
Civil Action  
Docket No.

HERVEY JACKSON, of      )  
Searsport, County of      )  
Waldo and State of      )  
Maine,                      )  
                            )  
Plaintiff      ) COMPLAINT  
                    ) and  
-vs-              ) REQUEST FOR PRE-  
                    ) LIMINARY INJUNC-  
RONALD F. HANDLEY,      ) TION  
as General Assis-      )  
tance Administrator      )  
of the Town of      )  
Searsport, and      )  
TOWN OF SEARSPORT,      )  
a Municipality lo-      )  
cated in the County      )  
of Waldo, State of      )  
Maine,                      )  
                            )  
Defendants      )

COUNT ONE

1. The plaintiff Hervey Jackson, has resided in Searsport for ten months, is 78 years of age, and in ill health. He has

had a colostomy, which requires care, such that it is necessary for him to reside in a boarding home.

2. The defendant, Town of Searsport is a municipality located in Waldo County, Maine. Pursuant to 22 M.R.S.A. §4504(1) the Town of Searsport has enacted an ordinance for general assistance administration, dated May 2, 1977, which has been filed with the Commissioner of Human Services, pursuant to §4504(4), a true copy of which is attached hereto as Appendix A.

3. The plaintiff Hervey Jackson has as his only source of income Social Security in the amount of \$226.10. He was receiving Supplemental Security Income, but that income was stopped in July, 1981.

when the Social Security Administration took the position that PUB.L. 96-611, enacted December 28, 1980, had retroactive effect to the November 14, 1980, transfer of Mr. Jackson's home to his children. This matter is presently upon appeal. Meanwhile, Mr. Jackson has inadeadequate income to pay for his boarding home care, which costs \$582 per month.

4. After extending credit for six months, the boarding home operator has taken steps to evict the plaintiff Hervey Jackson. He has served him with an eviction notice, which comes due March 7, 1982. The plaintiff Hervey Jackson's medical condition as aforesaid is such that an unplanned and precipitous move will result in transfer trauma, to his

irreparable injury.

5. The plaintiff Hervey Jackson is in need of general assistance and is entitled to the same; his position is such that he is entitled to temporary emergency general assistance, pursuant to Section IVJ of the ordinance aforementioned.

6. The plaintiff Hervey Jackson applied for general assistance on application dated February 20, 1982. A true copy of that application is attached hereto as Appendix B.

7. The defendant Town of Searsport has failed to grant or deny said application in writing within 24 hours, as it is required to by the terms of Title 22 M.R.S.A. §4504(3)(C), and its ordinance aforesaid Section IIID.

8. The plaintiff Hervey Jackson has no adequate remedy at law, as he has no means or income to remain in the boarding home beyond March 7, 1982, and the detrimental effects on his health and safety of his losing his residence in his age and condition of health are irreparable and irreversible.

COUNT TWO

9. Each and every allegation in paragraphs 1 through 8 of this Complaint are hereby realleged.

10. Defendant Ronald F. Handley at all times relative to this Complaint was acting as agent of the defendant Town of searsport, with in the scope of his authority, such that the defendant, Town of Searsport is chargeable with his

misconduct as after stated.

11. The defendant Ronald F. Handley spoke on the telephone on several occasions with Attorney John C. Hunt, who is acting as a representative of the plaintiff. In the course of these conversations the defendant Ronald F. Handley accepted a verbal modification of the application to change the amount of assistance requested from \$336 to \$355.90.

12. The defendant Ronald F. Handley represented to the plaintiff that his application would be approved on March 2, 1982. Plaintiff reasonably relied upon that representation. The defendant Ronald F. Handley made that representation, knowing it to be false, with the purpose of frustrating the plaintiff in his

statutory appeals rights and to deny to the plaintiff his rights under the United States Constitution, Amendment XIV. He did so with the purpose of stalling the application until after March 7, 1982, so that the Town of Searsport would avoid its legal obligation to pay the plaintiff Hervey Jackson general assistance.

13. As a proximate result of defendant's misconduct as aforesaid, the plaintiff Hervey Jackson was placed in fear of a precipitous and imminent loss of his residence at the boarding home. As a result, he has suffered, is suffering, and will suffer in the future great distress of mind and physical discomfort, all to his damage to the amount of \$5000.

14. The plaintiff's rights aforementioned, are rights secured by the Constitution and laws, within the contemplation of 42 U.S.C. §1983, such that reasonable attorney's fees are allowable pursuant to 42 U.S.C. §1988.

WHEREFORE, the plaintiff Hervey Jackson requests this Honorable Court, after hearing to:

I. Grant a preliminary injunction, enjoining the defendant Town of Searsport and the defendant Ronald F. Handley from failing to give the plaintiff Hervey Jackson written grant or denial of his present application for general assistance, or any future application he might make for general assistance, within 24 hours, as required by Statute and Ordinances;

II. To grant a temporary injunction, enjoining the defendant Town of Searsport and the defendant Ronald F. Handley from failing to give the plaintiff Hervey Jackson general assistance in the amount of \$355.90, per month, effective February 22, 1982, and until further order of court;

III. To grant such other relief as may be just in the temporary injunction;

IV. To permanently enjoin the Town of Searsport and the defendant Ronald F. Handley from denying the plaintiff Hervey Jackson general assistance, at all such times as he shall be entitled thereto;

V. To give judgment for plaintiff Hervey Jackson against the defendant Town of Searsport and Ronald F. Handley, jointly and severally, in the amount of

\$5000 as compensatory damages, and \$5000 as punitive or exemplary damages, his reasonable counsel fees, and his costs.

Dated: March 5, 1982

s/John C. Hunt  
JOHN C. HUNT  
Staff Attorney  
Legal Services for  
the Elderly, Inc.  
One Amherst Street  
P. O. Box 2723  
Augusta, ME 04330  
Attorney for the  
Plaintiff